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CAN STATES JUGGLE THE UNAUTHORIZED AND MULTIDISCIPLINARY PRACTICES OF LAW?: A LOOK AT THE STATES' CURRENT GRAPPLE WITH THE PROBLEM IN THE CONTEXT OF LIVING TRUSTS

Pamela Lopata⁺

The laws of succession in the United States, largely a function of state law, can be traced to English common law.¹ In feudal times, the king owned all of England's real property and he alone determined who could exert real property rights when an individual died.² As feudalism declined, however, Parliament enacted the Statute of Wills in order to grant citizens the right to bequeath their real property.³ As a result, individuals left real and personal property to their heirs, particularly family members.⁴ This area of law has experienced considerable changes since its inception and continues to evolve as we enter the 21st century.⁵

Despite the availability of numerous instruments available to transfer property, revocable inter-vivos trusts, commonly referred to as living

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1. See JOEL C. DOBRIS & STEWART E. STERK, *ESTATES AND TRUSTS* 8 (9th ed. 1998). Prior to the passage of the Statute of Wills in 1540, real property automatically passed by descent to the decedent's heir, usually the oldest son. See *id.* Essentially, the decedent had little choice but to comply with the rules of descent. See *id.*

2. See *Shriners Hosps. for Crippled Children v. Zrillic*, 563 So. 2d 64, 67 (Fla. 1990) (explaining that real property constituted most of society's wealth during feudal times).

3. See *id.* (arguing that as a result of the Statute of Wills, devising property was viewed as a statutory right, rather than an inherent property right); see also DOBRIS & STERK, *supra* note 1, at 8.

4. See DOBRIS & STERK, *supra* note 1, at 9 (citing *Hodel v. Irving*, 481 U.S. 704 (1987)). It has been argued that individuals have a natural right to bequeath their property as they see fit. See, e.g., Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6 & n.17 (1992) (indicating that Roman jurists professed this right). It has also been argued that inheritance encourages family values and stability because family ties are strengthened when individuals can provide for their children after death. See, e.g., Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 111-12 & n.226 (1990) (citing HEGEL'S PHILOSOPHY OF RIGHT §§ 170-80 (T. Knox trans. 1965)). But see *id.* at 12 ("There are also reasons to question the soundness of describing inheritance as the glue that holds families together.").

5. See, e.g., Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1059 (1996) (describing the law of wills and trusts as chaotic and as an area that displays a nebulous, unguided quality).

trusts, have become one of the most popular methods of transferring wealth in today's society.⁶ A living trust is unique in that the settlor, the individual who forms the trust, retains control of the trust during his lifetime.⁷ Living trusts have been hailed as "the most versatile tools in estate planing."⁸ In fact, many individuals choose revocable trusts for

6. See Owen G. Fiore et al., *Probate Avoidance and Other Uses of Trusts*, in ESTATE PLANNING FOR THE FAMILY BUSINESS OWNER (ALI-ABA Course of Study, Aug. 20, 1992), available in Westlaw, File No. C771 ALI-ABA 469, 475 (describing a revocable living trust as "a trust which can be revoked, amended, or otherwise changed by the settlor"); Jeff Modisett, *Living Trusts: A Consumer-Protection Perspective*, RES GESTAE, Sept. 1998, at 19, 23 (discussing that the "proliferation of the living-trust industry requires" that the public be educated about the risks associated with buying such trusts from solicitors); Guy Halverson, *Estate Planning You Can Trust for Your Family*, CHRISTIAN SCI. MONITOR, Aug. 9, 1999, at 13 ("Trusts have become one of the most popular legal instruments of the 1990s.").

Although this Comment focuses mainly on revocable living trusts, there are different types of trusts that one can establish. An irrevocable trust cannot be revoked or amended by the settlor and it must expressly state that it is irrevocable. See Fiore et al., *supra* at 474. A testamentary trust is formed under a settlor's last will and testament and is irrevocable. See *id.* at 475. An A-B living trust is established by a husband and wife and, upon the first death, severs into two separate trusts: one for the decedent, composed of the decedent's property, and one for the survivor, composed of the survivor's property. See *id.* at 475-76. An A-B-C living trust is also established by a husband and wife; however, upon the first death, it is severed into three trusts: one for the survivor, one for the decedent, and a marital trust. See *id.* at 476. A simple trust is one in which the trustee pays all of the trust income to the beneficiary as it amasses. See *id.* A complex trust gives the trustee the discretion to either pay the beneficiary the income of the trust on a current basis or let the trust income accumulate. See *id.* A totten trust, also called a tentative trust, is created when the settlor deposits money into a bank account, thereby creating a trust device for the benefit of another. See BLACK'S LAW DICTIONARY 1513 (6th ed. 1990). A pour-over trust is one in which the residue of an estate is poured over into an inter vivos trust. See *id.* at 1512. A private trust is one set up for the benefit of an identifiable beneficiary. See *id.* A charitable trust is one created for the charitable benefit of a group of people, either unnamed individuals or the public in general. See *id.* at 1510. A mixed trust is one that benefits both private individuals and charities. See *id.* at 1512.

7. See Fiore et al., *supra* note 6, at 473, 475. The following is a basic example of how a living trust functions:

Under a simple form of this arrangement, O transfers property to X to hold in trust and pay the income to O for life, and on O's death to distribute the property to O's children. O retains the power to revoke the trust. If O desires, O can be the trustee herself under a declaration of trust; there is no necessity of having a third-party trustee.

JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 656 (3d ed. 1993). The trustee is the individual who manages the trust for the benefit of the beneficiary and holds legal title to the trust property. See DOBRIS & STERK, *supra* note 1, at 448. If a trust instrument does not name a trustee, a court will appoint one to ensure continuance of the trust. See *id.* at 449.

8. Kelly Smith, *Family Trust: To Tailor an Estate Plan to Your Family's Unique Circumstances, You Probably Need To Establish a Trust—Or Two*, MONEY MAG., Sept. 1, 1999, at 134.

this reason, and also because these trusts may avoid some probate costs,⁹ protect property, provide for the settlor during the settlor's lifetime, minimize taxes, and ensure the transfer of wealth to future generations.¹⁰ These positive qualities have contributed to the popularity of living trusts.¹¹

The popularity of revocable living trusts¹² attracts both lawyers¹³ and nonlawyers¹⁴ to draft such instruments for clients with increased frequency.¹⁵ Problems related to revocable trusts have begun to emerge,

9. See Fiore et al., *supra* note 6, at 474. Revocable trusts may avoid probate costs because a settlor changes legal title from a fee simple in himself to a fee simple in a trustee during his own lifetime. See DUKEMINIER & KRIER, *supra* note 7, at 656. Probate is the process by which a decedent's property passes title to a new owner. See *id.* After an individual dies, a probate court usually appoints a personal representative to collect the decedent's assets, pay his debts, and distribute his remaining assets. See *id.* "The key to avoiding probate is to have title to property put in some form so that a court order changing title at death is unnecessary." *Id.* But see Toddi Gutner, *Finding a Trust You Can Trust*, BUS. WK., July 19, 1999, at 126, 126 (noting that if just one asset is left out of the trust, the beneficiaries will have to go through probate). Various financial intermediaries are competing against the probate system so that individuals' may pass on their property after death without probate. See generally John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109-13 (1984) [hereinafter *The Nonprobate Revolution*] (recognizing life insurance, pension accounts, joint accounts, and revocable living trusts as the four main types of will substitutes). Financial intermediaries have successfully pushed probate to the fringes of the succession process. See *id.* at 1140.

10. See Fiore et al., *supra* note 6, at 474. Trusts have survived throughout the centuries because of their remarkable utility. See DOBRIS & STERK, *supra* note 1, at 445 (citing John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165 (1997)).

11. See Nancy Shurtz, *Revocable Living Trusts Examined in New Book*, EST. PLAN., July 1997, at 294, 294 (reviewing DOUG H. MOY, *LIVING TRUSTS: DESIGNING, FUNDING, AND MANAGING A REVOCABLE LIVING TRUST* (1997)).

12. See Anne Veigle, *Shielding Your Estate From Sharp Tax Bite*, WASH. TIMES, Aug. 3, 1999, at E7 (touting living trusts as the most common type of trust).

13. See generally Judge Joseph S. Mattina, *The Probate Court and the Non-Probate Revolution*, 13 QUINNIPIAC PROB. L.J. 409, 411-12 (1999) (stating that attorneys in New York have begun to draft revocable living trusts for clients more frequently within the last seven or eight years).

14. See generally Modisett, *supra* note 6 (explaining the tactics and deceptive practices nonlawyers employ in their efforts to attract consumers to living trusts).

15. See, e.g., Mattina, *supra* note 13, at 413-14 (citing *Matter of Pozarny*, 677 N.Y.S.2d 714 (1998)). In *Pozarny*, a New York lawyer signed a franchise agreement with an estate planning institute and, for \$10,000, received standard living trust forms that appeared to be valid in all states. *Id.* at 414. Problems ensued, however, and one client's estate was forced to go through probate. See *id.* Judge Mattina stated that his staff was appalled when it saw the trust agreement that was full of "inconsistencies, ambiguities, and outright errors." *Id.*

Fees for drafting living trusts vary among lawyers and nonlawyers depending on the intricacy of the situation and the size of the estate. See Smith, *supra* note 8, at 134. Lawyers' fees can vary from \$1500 for a simple trust to \$5000 for a complicated trust. See

however, as this type of trust continues to develop.¹⁶ At the forefront of these problems stands the issue of whether nonlawyers who market, sell, and draft living trusts engage in the unauthorized practice of law.¹⁷

Although there is no universal definition of the unauthorized practice of law,¹⁸ states regulate the practice of law within their boundaries through case law,¹⁹ state statutes,²⁰ state supreme court advisory opinions,²¹ state supreme court rules,²² and state bar rules of professional conduct.²³ Courts often decide unauthorized practice of law issues on a case-by-case basis.²⁴ Although this approach has resulted in differences among states regarding what constitutes the practice of law, the ability to practice is almost entirely limited to individuals admitted to state bar associations.²⁵

id. Some lawyers and nonlawyers charge anywhere from \$100 to several thousands of dollars. See Halverson, *supra* note 6, at 13. Some attorneys charge as little as \$500 to draft a trust. See Sandra Block, *To Protect Your Estate, Try a Trust*, USA TODAY, Aug. 20, 1999, at 3B. Other attorneys charge up to \$10,000 for trust preparation. See Gutner, *supra* note 9, at 126.

16. See Fiore et al., *supra* note 6, at 478 (stating that many problems are caused by improper funding and maintenance of trusts); see also Mattina, *supra* note 13, at 409 (discussing deceptive advertising tactics that herald living trusts as the only technique available that saves estate taxes).

17. See Mattina, *supra* note 13, at 409 ("With the proliferation of Living Trusts has come a proliferation of problems."); Lori A. Stiegel et al., *On Guard Against Living Trusts Scams*, NAT'L B. ASS'N MAG., Jan./Feb. 1994, at 20, 20 (stating that ethics opinions and court decisions discuss the unauthorized practice of law issue as it relates to living trusts).

18. See Robert B. Van Wyck & Lynda C. Shely, *Unauthorized Practice of Law: Should We Just Give Up?*, ARIZ. ATT'Y, Jan. 1999, at 22, 24.

19. See, e.g., *Land Title Abstract & Trust Co. v. Dworken*, 193 N.E. 650, 653 (Ohio 1934) (discussing activities that constitute the practice of law).

20. See, e.g., GA. CODE ANN. § 15-19-50 (1999) (defining the practice of law for Georgia).

21. See, e.g., Florida Bar re Advisory Opinion—Nonlawyer Preparation of Living Trusts, 613 So. 2d 426, 428 (Fla. 1992) (holding that the "assembly, drafting, execution, and funding of a living trust document constitute the practice of law").

22. See, e.g., ARIZ. SUP. CT. R. 31(a)(3) (1997 & Supp. 2000) (stating who may practice law in Arizona).

23. See, e.g., FLA. STAT. ANN. Bar Rule 4-5.5 (West 1994 & Supp. 2001) (providing attorneys with guidance by defining the unauthorized practice of law in Florida).

24. See, e.g., *In re Unauthorized Practice of Law Rules Proposed by the South Carolina Bar*, 422 S.E.2d 123, 124 (S.C. 1992) (stating that it is best to review unauthorized practice of law issues in a case setting and, therefore, unwise to formulate a comprehensive definition of the practice of law).

25. See Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 FORDHAM L. REV. 2581, 2581 (1999). Unauthorized practice prohibitions raise constitutional issues, such as first amendment and due process violations; however, such issues are beyond the scope of this article. For a thorough discussion of such issues see Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*,

State bar associations play an important role in dealing with the unauthorized practice of law.²⁶ These associations often form committees to monitor the unauthorized practice of law, as well as to back legislative efforts to define the unauthorized practice of law.²⁷ Despite these efforts, individuals who are not admitted to a state bar association engage in activities that come very close to, and even constitute, the unauthorized practice of law.²⁸

Nonlawyers who market living trusts use many different tactics to attract new clients, such as newspaper and magazine advertisements, direct mail materials, telephone calls to individuals' homes, prize drawings, and house-to-house solicitations.²⁹ Nonlawyers use these tactics to entice individuals to attend seminars and to convince them to purchase living trusts.³⁰ Individuals and companies that market living

34 STAN. L. REV. 1 (1981).

26. See *infra* section III.C (discussing the role of state bar associations in the context of the unauthorized practice of law).

27. See *infra* section III.C.

28. See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, 179 F.3d 956 (1999) (per curiam) (vacating and remanding the district court's decision, which prohibited a corporation from selling and distributing software products that contained personalized documents, including living trusts, because such sale and distribution constituted the practice of law); *Florida Bar v. American Senior Citizens Alliance, Inc.*, 689 So. 2d 255, 256-57 (Fla. 1997) (per curiam) (finding that a corporation engaged in the unauthorized practice of law when nonlawyers who worked for the company marketed and sold living trusts); *Cleveland Bar Ass'n v. Yurich*, 642 N.E.2d 79, 80 (Ohio Bd. Unauth. Prac. 1994) (holding that a corporation that marketed and sold living trusts engaged in the unauthorized practice of law by tendering legal advice and preparing and marketing trust documents).

29. See Modisett, *supra* note 6, at 19; see also Brad Hendricks, *Barbarians at the Gate: Image, Ethics and the Unauthorized Practice of Law*, 33 ARK. LAW. 32, 32 (1998). Hendricks takes a closer look at this recent trend:

Non-lawyers with a toll free number offer estate planning as if one need only paint by numbers in order to properly protect and distribute one's assets after death. Living trusts are sold by unlicensed individuals with no thought given to the anguish suffered by a family when they learn that it is unenforceable and useless.

Id. A Colorado nonlawyer, who worked for an estate planning service, convinced a husband and wife that it would cost \$65,000 to probate their estate, and succeeded in selling them a trust for \$1595. See *People v. Laden*, 893 P.2d 771, 771-72 (Colo. 1995) (per curiam). "Living Trusts are being promoted, that is, mass-marketed, sold as a commodity, like a box of cereal, by so-called financial planners who are not attorneys." Mattina, *supra* note 13, at 412.

30. See Modisett, *supra* note 6, at 19 (explaining that individuals who have attended such seminars complain that salespeople use "high-pressure, scare tactics"). Modisett offers that:

In one reported instance, an unsuspecting elderly woman allowed a salesman (who had just sold a living trust to her neighbor) come into her home. The woman was flattered when the young salesman took interest in her jewelry. She

trusts also sell do-it-yourself books and software products.³¹ Many of these nonlawyers who market and sell living trusts do so through their own personalized web sites.³² With the advent of the multidisciplinary practice of law, it is possible that lawyers and nonlawyers may one day work together to market, draft, and sell revocable living trusts, as well as other estate planning instruments.³³ Several courts, however, have currently held that joint efforts among lawyers and nonlawyers in marketing, drafting, and selling living trusts constitute the unauthorized practice of law.³⁴

This Comment first examines what constitutes the unauthorized practice of law as defined by the American Bar Association and various state statutes, as well as what constitutes the multidisciplinary practice of law.³⁵ Part II of this Comment focuses on the current state of the unauthorized practice of law with respect to lawyers and nonlawyers engaged in the living trust business in light of state advisory opinions, state statutes, and court decisions. In Part III, this Comment analyzes why such statutes are difficult, if not impossible, to pass, but posits that new state legislation must be implemented to define clearly the meaning of the unauthorized practice of law. Part III also discusses why public protection should be weighed against this lucrative area of estate planning. This Comment concludes that statutes regarding the unauthorized practice of law must be more clearly defined so that they

was happy to go into her bedroom and bring out all her special jewelry for him to see. The con artist was so slick that the woman agreed to go with him to have one of her rings appraised. On another occasion he accompanied her to the bank, went through the contents of her safe deposit box and had her withdraw funds from her bank.

Id.

31. See, e.g., *The Estate Plan* (visited Sept. 18, 2000) <http://www.the-estate-plan.com/books_and_videos.htm> (selling an array of books and software products geared to help purchasers simplify the estate settlement process); *Do You Need a Lawyer To Make Your Living Trust?* (visited Sept. 18, 2000) <http://www.nolo.com/encyclopedia/articles/ep/living_trust.html> ("If you are willing to do it yourself, with a self-help aid such as those offered by Nolo and other publishers, it will cost you about \$30 for a book or \$50 for software.").

32. See, e.g., Heritage Living Trust, *The Definitive Living Trust Website* (visited Sept. 18, 2000) <<http://www.heritage-livingtrust.com>>; Independence Trust, *A Full-Service Trust Company Serving America Since 1977* (visited Sept. 18, 2000) <<http://www.my-trust.com>>.

33. See *infra* notes 90-91 and accompanying text (providing the American Bar Association's example of a functioning multidisciplinary practice).

34. See *infra* note 40 and accompanying text (discussing that attorneys have been found guilty of the unauthorized practice of law when aiding nonlawyers in their attempts to market, sell, and draft living trusts).

35. In order to give a broad overview of the unauthorized practice of law in the United States, the rules, statutes, and case law of Florida, Ohio, California, and Arizona will be explored.

can protect the public, the legal profession, and nonlawyers. If the multidisciplinary practice of law is to be fully accepted in and embraced within the United States, there must first be clear and coherent unauthorized practice of law statutes in place.

I. THE CURRENT STATUS OF THE UNAUTHORIZED PRACTICE OF LAW

Every state prohibits nonlawyers from engaging in the practice of law.³⁶

36. See Denckla, *supra* note 25, at 2581. *But see id.* ("The definition of what constitutes the practice of law or the unauthorized practice of law is by no means uniform, even within the same jurisdiction.").

A sample of state statutes defining the "practice of law" and/or indicating who is authorized to practice law is as follows: ALA. CODE § 34-3-6 (1997 & Supp. 2000); ALASKA STAT. ANN. § 08.08.210 (Michie 1998); ARK. CODE ANN. § 16-22-206 (Michie 1999); CAL. BUS. & PROF. CODE § 6125 (West 1990 & Supp. 2001); COLO. REV. STAT. ANN. § 12-5-101 (2000); CONN. GEN. STAT. ANN. § 51-88 (West 1999 & Supp. 2001); DEL. CODE ANN. tit. 10, § 1906 (1999); D.C. CODE ANN. § 11-2501 (1995 & Supp. 2000); GA. CODE ANN. § 15-19-50 (1999); 705 ILL. COMP. STAT. ANN. § 205/1 (West 1999); LA. REV. STAT. ANN. § 37:212 (West 1998); MD. CODE ANN., BUS. OCC. & PROF. § 10-601 (2000); MASS. GEN. LAWS ANN. ch. 221, § 46A (1993 & Supp. 2001); MO. ANN. STAT. § 484.010 (West 1998 & Supp. 2000); MONT. CODE ANN. § 37-61-201 (1999); NEB. REV. STAT. § 7-101 (1997); N.H. REV. STAT. ANN. § 311:7 (1995 & Supp. 2000); N.M. STAT. ANN. § 36-2-27 (Michie 1991); N.C. GEN. STAT. § 84-2.1 (1998); N.D. CENT. CODE § 27-11-01 (1991 & Supp. 1999); OHIO REV. CODE ANN. § 4705.01 (Anderson 1999 & Supp. 2000); OKLA. STAT. ANN. tit. 5, § 12 (West 1996 & Supp. 2001); OR. REV. STAT. § 9.160 (1999); R.I. GEN. LAWS. § 11-27-2 (1994 & Supp. 1999); S.C. CODE ANN. § 40-5-310 (Law. Co-op. 1999 & Supp. 2000); S.D. CODIFIED LAWS § 16-18-1 (Michie 1995); TENN. CODE ANN. § 23-1-108 (1994 & Supp. 2000); UTAH CODE ANN. § 78-51-10 (1996 & Supp. 2000); VA. CODE ANN. § 54.1-3903 (Michie 1998 & Supp. 2000); WASH. REV. CODE ANN. § 2.48.170 (1988 & Supp. 2001); W. VA. CODE § 30-2-1 (1998 & Supp. 2000).

The following sample of state statutes relate to the "unauthorized practice of law" and, unless stated otherwise parenthetically, simply make it unlawful for non-duly licensed individuals to "practice law": ALA. CODE § 34-3-7 (1997 & Supp. 2000); ARK. CODE ANN. § 16-22-209 (Michie 1999); CAL. BUS. & PROF. CODE § 6126 (West 1990 & Supp. 2001); GA. CODE ANN. § 15-19-51 (1999) (forbidding a nonlawyer to "render or furnish legal services"); HAW. REV. STAT ANN. § 605-14 (Michie 1998 & Supp. 2000) (making it unlawful for non-duly licensed individuals, firms, associations, and corporations to engage in the practice of law); IDAHO CODE § 3-420 (1998); IND. CODE ANN. § 33-1-5-1 (Michie 1999 & Supp. 2000); KY. REV. STAT. ANN. § 524.130 (Michie 1999); La. Rev. Stat. Ann. § 37:213 (West 1998); ME. REV. STAT. ANN. tit. 4, § 807 (West 1998); MICH. COMP. LAWS § 600.916 (1996 & Supp. 2000); MINN. STAT. ANN. § 481.02 (1990 & Supp. 2001) (making it unlawful for individuals not admitted to the Minnesota State Bar to practice law, including "giv[ing] legal advice . . . prepar[ing] legal documents . . . advising or counseling in law . . . furnishing to others the services of a lawyer . . . prepar[ing] . . . any will or testamentary disposition or *instrument of trust* [or] any other legal document" (emphasis added)); MISS. CODE ANN. § 73-3-55 (1999) (making it unlawful for non-duly licensed individuals to practice law, which includes "writ[ing] or dictat[ing] any instrument of writing"); N.H. REV. STAT. ANN. § 311:7-a (1995 & Supp. 2000) (granting the attorney general the power to bring action against any person who engages in the unauthorized practice of law); N.J. STAT. ANN. § 2C:21-22 (penalizing an individual for knowingly engaging in the unauthorized practice of law); N.Y. JUD. LAW § 476-a (Consol. 1983 & Supp. 1987)

While the exact provisions regarding the practice and unauthorized practice of law do differ from state to state, only individuals admitted to a state's bar association may practice law within that state.³⁷ According to the American Bar Association (ABA), the main goal of all unauthorized practice of law rules includes protecting the public from harm.³⁸ Specifically, Rule 5.5 of the ABA Model Rules of Professional Conduct prohibits a lawyer from "assist[ing] a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law."³⁹ Several courts have determined that lawyers engage in the unauthorized practice of law if they aid nonlawyers' attempts to market, sell, and draft living trusts.⁴⁰ Likewise,

(same); N.C. GEN. STAT. § 84-4 (1998); 42 PA. CONS. STAT. ANN. § 2524 (West 1981 & Supp. 2000); VA. CODE ANN. § 54.1-3904; WASH. REV. CODE ANN. § 2.48.180 (1998 & Supp. 2001); Wis. Stat. Ann. § 757.30 (West 1981 & Supp. 2000); Wyo. Stat. Ann. § 33-5-117 (Michie 1999).

37. See Denckla, *supra* note 25, at 2581 (noting that in addition to bar admission, states usually impose certain governmental licensing, educational, examination, and moral requirements).

38. See Alex J. Hurder, *Nonlawyer Legal Assistance and Access to Justice*, 67 FORDHAM L. REV. 2241, 2243 (1999) (explaining that the ABA Commission on Nonlawyer Practice issued a 1995 report suggesting that "law-related nonlawyer activities that pose a risk of harm to the public" be regulated, and if regulation cannot adequately protect the public, the Commission called for the prohibition of such activities); John F. Sutton, Jr., *Unauthorized Practice of Law by Lawyers: A Post-Seminar Reflection on "Ethics and the Multijurisdictional Practice of Law,"* 36 S. TEX. L. REV. 1027, 1028 (arguing that each state has a rational interest in public protection). *But see* Jim Calle, *Bar Seeks To Protect Public with Non-Lawyer Practice Rules*, ARIZ. ATT'Y, Mar. 1994, at 10, 14 (quoting Allen Merrill, an Arizona legal document service owner, as saying that the Arizona Bar is not being truthful about its assertion that unauthorized practice of law prohibitions are for public protection; rather, he believes the Arizona Bar wants to put nonlawyers out of business).

39. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5(b) (2000); *see also* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 3-101(A) (1980) ("A lawyer shall not aid a non-lawyer in the unauthorized practice of law."). *But see* Sutton, *supra* note 38, at 1030 (conceding that lawyers often breach Rule 5.5). Unauthorized practice of law rules prior to the 1930s focused on keeping nonlawyers from appearing in courts. *See* Ryan Talamante, Note, *We Can't All Be Lawyers... Or Can We? Regulating the Unauthorized Practice of Law in Arizona*, 34 ARIZ. L. REV. 873, 875 (1992). As unauthorized practice of law complaints began to increase, the ABA established its first Committee on the Unauthorized Practice of Law in 1930. *See id.* By 1938, more than 400 state and local bar associations had created such committees. *See id.* As fears concerning the unauthorized practice of law grew, state legislatures passed statutes to keep nonlawyers from practicing in law related activities. *See id.*

40. *See* *People v. Volk*, 805 P.2d 1116, 1119 (Colo. 1991) (per curiam) (en banc) (holding that an attorney aided in the unauthorized practice of law by reviewing living trust documents sold by nonlawyers); *People v. Macy*, 789 P.2d 188, 189 (Colo. 1990) (per curiam) (en banc) (holding that a lawyer who reviewed living trust packages prepared by nonlawyers and answered nonlawyers' questions regarding clients' concerns engaged in the unauthorized practice of law); *People v. Boyls*, 591 P.2d 1315, 1316 (Colo. 1979) (en

courts have found nonlawyers and nonlegal corporations to engage in the unauthorized practice of law if they market, sell, and draft living trusts independently.⁴¹

Due to the fact that individuals today generally live longer than their ancestors,⁴² the need for living trusts in the estate planning business is growing.⁴³ Nonlawyers participate in the living trust market to advance their own monetary self-interests,⁴⁴ particularly in states like Florida and Pennsylvania, where many older people reside.⁴⁵ These states, among others, face the issue of what constitutes the unauthorized practice of law

banc) (holding that an attorney, who helped nonlawyers market trusts, aided in the unauthorized practice of law); *Cleveland Bar Ass'n v. Yurich*, 642 N.E.2d 79, 85 (Ohio Bd. Unauth. Prac. 1994) (holding that a corporation that marketed and sold living trusts, as well as provided customers with legal advice regarding trusts and estate planning matters, engaged in the unauthorized practice of law). Attorneys assisting nonlawyers with furnishing living trusts are said to create a conflict of interest by concurrently working for a trust marketing company and its client. See *In re Mid-America Living Trust Assocs., Inc.*, 927 S.W.2d 855, 862 (Mo. 1996) (en banc); see also generally MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (2000) (stating, in pertinent part, that "[a] lawyer shall not represent a client if the representation of that client will be directly adverse to another client . . .").

41. See *Florida Bar v. American Senior Citizens Alliance, Inc.*, 689 So. 2d 255, 256, 259 (Fla. 1997) (per curiam) (holding that a corporation whose nonlawyer employees assembled, drafted, executed, and funded living trusts engaged in the unauthorized practice of law); *Mid-America*, 927 S.W.2d at 870-71 (enjoining an estate planning company from soliciting living trusts); *Mahoning County Bar Ass'n v. Senior Servs. Group, Inc.*, 642 N.E.2d 102, 102 (Ohio Bd. Unauth. Prac. 1994) (finding that an estate planning business engaged in the unauthorized practice of law when it furnished legal advice and conducted seminars on estate planning tools, such as trusts, and probate matters).

42. See Marc S. Bekerman & Gerry W. Beyer, *Trusts and Estates Practice into the Next Millennium*, PROB. & PROP., Jan./Feb. 1999, at 7, 7; see also Larry Polivka, *In Florida the Future Is Now: Aging Issues and Policies in the 1990's*, 18 FLA. ST. U. L. REV. 401, 401 (1991) ("The average age of the American population is increasing steadily as the number of people over sixty-five grows.").

43. See Toddi Gutner, *supra* note 9, at 126; see also, Margaret Schmitz Rizzo, *Estate Planners Are Valuable: They Maximize Inheritances and Minimize Taxes*, KAN. CITY STAR, Aug. 1, 1999, available in 1999 WL 2428330 (explaining that between 1990 and 2010, inheritance money expected to pass from baby boomers to their children is projected to exceed \$10 trillion).

44. See *Living Trust Scams*, TEX. B.J., July 1999, at 745, 745 (stating that nonlawyers make millions of dollars each year by selling unnecessary trusts).

45. See Polivka, *supra* note 42, at 402 (explaining that Florida has the greatest population percentage of persons over the age of 65 and projecting that Florida's over-75 population would number 1.4 million in 2000 and that the over-85 population would number 347,000 in 2000); Tim Schooley, *Pennsylvania's Seniors Garner Large Share of the State's Federal Funding*, PITT. BUS. TIMES, May 17, 1999, available at <<http://www.pittsburgh.bcentral.com/pittsburgh/stories/1999/05/17/focus5.html>> (indicating that Pennsylvania currently has a senior citizen population of 3.4 million).

within the context of living trusts.⁴⁶ States, however, use different methods to define and regulate the practice of law and, in turn, the unauthorized practice of law.⁴⁷

A. Florida: Forming a Definition of the Practice of Law Through an Advisory Opinion

In an effort to educate nonlawyers in Florida about the unauthorized practice of law, the Florida Supreme Court has issued a number of relevant advisory opinions since 1988,⁴⁸ the most recent being released in 1992.⁴⁹ The Florida Supreme Court asserted in its 1992 advisory opinion that “the assembly, drafting, execution, and funding of a living trust document constitute[s] the practice of law” and, in order to protect the

46. See Steven G. Nilsson, *Are Living Trusts Void when Commercially Formed Through the Unauthorized Practice of Law?*, FLA. B.J., Apr. 1995, at 24, 24 (addressing the validity of illegally formed living trusts); Wendy I. Wills, *The Ethical Utilization of Paralegals in Ohio*, 45 CLEV. ST. L. REV. 711, 713 (recalling several Ohio court cases dealing with nonlawyers engaged in the unauthorized practice of law, including the marketing and preparation of living trusts).

47. See *supra* notes 19-24 and accompanying text (describing the different methods states use to regulate the practice of law).

48. See Robert M. Sondak, *Access to Courts and the Unauthorized Practice of Law—10 Years of UPL Advisory Opinions*, FLA. B.J., Feb. 1999, at 14, 14 (noting that although courts are normally not permitted to issue advisory opinions, the Florida Constitution contains an exception that allows the court to issue such opinions as requested by the Governor and government agencies). The Florida Constitution states that:

The governor may request in writing the opinion of the justices of the supreme court as to the interpretation of any portion of this constitution upon any question affecting the governor's executive powers and duties. The justices shall, subject to their rules of procedure, permit interested persons to be heard on the questions presented and shall render their written opinion not earlier than ten days from the filing and docketing of the request, unless in their judgment the delay would cause public injury.

FLA. CONST. art. IV, § 1(c). The Florida Supreme Court agreed to issue advisory opinions so that nonlawyers can determine, prior to any unauthorized practice of law enforcement measures, whether their proposed activity is prohibited. See Sondak, *supra*, at 14. This practice began in February, 1988 and continues today. See *id.*

49. See Florida Bar re Advisory Opinion—Nonlawyer Preparation of Living Trusts, 613 So. 2d 426, 426, 427 (Fla. 1992) (per curiam). This opinion addressed:

whether it constitutes the unlicensed practice of law for a corporation or other nonlawyer to draft living trusts and related documents for another where the information to be included in the living trust is gathered by nonlawyer agents of the corporation or by the nonlawyer and the completed documents are reviewed by a member of the Florida Bar prior to execution.

Id. at 426. The Florida Supreme Court rejected the argument posed by interested parties, including accounting firms and estate planning corporations, that this opinion violated constitutional issues, including freedom of commercial speech and the right to liberty and property without due process of law. See *id.* at 428.

public, held that only attorneys may perform these activities.⁵⁰ The court also stated, however, that “gathering the necessary information for the living trust does not constitute the practice of law, and nonlawyers may properly perform this activity.”⁵¹

The Florida Supreme Court has since relied upon this advisory opinion in subsequent cases pertaining to nonlawyers who prepare living trusts.⁵² However, in *Florida Bar v. American Senior Citizens Alliance, Inc.*,⁵³ the Florida Supreme Court declined to clarify the meaning of “gathering the necessary information.”⁵⁴ The court’s failure to define the phrase left lawyers, nonlawyers, and the public without a clear indication of the role that nonlawyers may legally play in preparing living trusts.⁵⁵

In addition to the Florida Supreme Court’s advisory opinions

50. *Id.* at 427 (asserting that it is also the lawyer’s responsibility to determine if a client needs a living trust). *But cf.* Florida Bar re Advisory Opinion—Nonlawyer Preparation of Pension Plans, 571 So. 2d 430, 433 (Fla. 1990) (finding that nonlawyers may prepare and administer pension plans, as well as practice before federal agencies, because federal regulation and licensing of nonlawyers in this area provides adequate public protection).

51. *Nonlawyer Preparation of Living Trusts*, 613 So. 2d at 428 (relying on previous decisions). *But see infra* notes 112-14 and accompanying text (discussing that gathering necessary information regarding living trusts is sometimes considered the unauthorized practice of law); *see also In re Mid-America Living Trust Assocs., Inc.*, 927 S.W.2d 855, 865 (Mo. 1996) (en banc) (holding that gathering necessary information in order to select a certain type of trust for a client may constitute the practice of law).

52. *See, e.g., Florida Bar v. American Senior Citizens Alliance, Inc.*, 689 So. 2d 255, 259 (Fla. 1997) (holding that a corporation engaged in the unauthorized practice of law when nonlawyer employees gave legal advice and performed legal services in connection with the preparation of living trusts); *Florida Bar v. Schramek*, 616 So. 2d 979, 981 (Fla. 1993) (finding that a nonlawyer engaged in the unauthorized practice of law when he, among other things, prepared living trust documents and provided legal advice regarding such documents).

53. 689 So. 2d 255 (Fla. 1997).

54. *Id.* at 258. However, the referee assigned to investigate American Senior Citizens Alliance, Inc., concluded that the company went beyond “gathering the necessary information for a living trust” when nonlawyer employees entered clients’ homes and gave specific legal advice. *Id.* at 258-59.

55. *See id.* The court stated that the referee’s findings were amply supported by evidence and referred to prior decisions that ruled that going beyond the gathering of necessary information indeed constitutes the unauthorized practice of law. *See id.* (referring to *Florida Bar v. Brumbaugh*, 355 So. 2d 1186 (Fla. 1978) and *Nonlawyer Preparation of Living Trusts*, 613 So. 2d at 426); *see also* Alicia R. Bromfield, Comment, *The Florida Bar v. American Senior Citizens Alliance: Is “Gathering the Necessary Information” the Unlicensed Practice of Law?*, 12 QUINNIPIAC PROB. L.J. 523, 534-35 (1998) (arguing that when a nonlawyer gathers the necessary information from a client regarding a revocable trust, the client will inevitably ask legal questions that the nonlawyer will answer). The “gathering of information” by nonlawyers is dangerous to the public because nonlawyers may not be able to deal with the complexities of living trusts, are not regulated in the same way as lawyers, and are driven by profit. *See id.*

addressing the practice of law, the Florida Rules of Professional Conduct address what constitutes the unauthorized practice of law.⁵⁶ Florida Bar Rule 4-5.5 provides that a lawyer cannot “(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or (b) assist a person who is not a member of the bar in activity that constitutes the unlicensed practice of law.”⁵⁷ Although comments to the rule offer some guidance as to its application,⁵⁸ its terms remain ambiguous and difficult to adhere to for both lawyers and nonlawyers. Despite this ambiguity, Florida considers the unauthorized practice of law to be a criminal misdemeanor.⁵⁹ There have been few criminal prosecutions of nonlawyers, however, for allegedly engaging in the unauthorized practice of law.⁶⁰

B. The Unauthorized Practice of Law: the Judiciary's Case-by-Case Approach

As opposed to Florida where the definition of what constitutes the practice of law has in large part developed through state advisory opinions, the definition of the practice of law in Arizona has evolved mainly from judicial precedent—the case-by-case approach.⁶¹ Over time, Arizona case law has determined that the practice of law includes, but is not limited to, preparing legal documents, furnishing legal advice, or representing an individual before a court or administrative agency.⁶²

The Arizona Supreme Court Rules prohibit an individual who is not an active member of the state bar from practicing law in Arizona.⁶³

56. See FLA. STAT. ANN. Bar Rule 4-5.5 (West 1994 & Supp. 2001).

57. *Id.* The rule's comment indicates, however, that a lawyer can employ nonlawyers and delegate functions to them provided that the lawyers retain responsibility for such work. *Id.* cmt.

58. See *id.* cmt.

59. See FLA. STAT. ANN. § 454.23 (West 1991 & Supp. 2001). But see Talamante, *supra* note 39, at 883 (noting that Arizona has no criminal statute that punishes the unauthorized practice of law).

60. See Nilsson, *supra* note 46, at 24 (reasoning that although the unauthorized practice of law is a crime, it will continue due to the small risk of prosecution and the lucrative nature of the business).

61. See generally Van Wyck & Shely, *supra* note 18, at 24.

62. See *In re Fleischman*, 933 P.2d 563, 567 (Ariz. 1997) (en banc) (concluding that a judge engaged in the unauthorized practice of law and violated the Arizona Code of Judicial Conduct and the Arizona Constitution when he acted as a spokesperson for a corporation and gave legal advice regarding proposed business agreements); see also *State Bar of Arizona v. Arizona Land Title & Trust Co.*, 366 P.2d 1, 14 (Ariz. 1961) (en banc) (determining that the practice of law involves acts, performed in or out of court, “which lawyers customarily have carried on from day to day through the centuries”).

63. ARIZ. SUP. CT. R. 31(a)(3) (1997 & Supp. 2000). Note, however, that the rule provides several exceptions. See *id.* R. 31(a)(4). For example, nonlawyers may represent

Presumably, a nonlawyer in Arizona who drafts legal documents, provides legal advice, or represents an individual before a court without attorney oversight engages in the unauthorized practice of law.⁶⁴ The Arizona Supreme Court Rules bind members of the Arizona Bar; however, whether these rules apply to nonlawyers remains unclear.⁶⁵ The judiciary's case-by-case analysis of unauthorized practice of law issues has generated great confusion as to what exactly constitutes the unauthorized practice of law.⁶⁶ After a long history of failed attempts to legislate the unauthorized practice of law, the Arizona State Bar's Consumer Protection Committee has taken action to educate the public about the dangers associated with the unauthorized practice of law.⁶⁷

individuals in small claims cases in the Arizona Tax Court. *See id.* R. 31(a)(4)(D).

64. *See* Van Wyck & Shely, *supra* note 18, at 24 (noting, however, that it is not the unauthorized practice of law if an attorney's nonlegal support staff prepares legal documents, as long as the attorney reviews such documents).

65. *See* Talamante, *supra* note 39, at 886. Also unsettled is whether the court can regulate nonlawyers who engage in activities outside of the courtroom; however, *Arizona Land Title & Trust Co.* confirms that the Arizona Supreme Court can "enjoin nonlawyers from engaging in the unauthorized practice of law *outside the courtroom*." *Id.* at 888 & n.158; *see also Arizona Land Title & Trust Co.*, 366 P.2d at 14.

66. *See* Talamante, *supra* note 39, at 875-77 (stating that the public thinks the State Bar regulates anyone participating in the practice of law, while bar members think the State Bar does nothing about the unauthorized practice of law).

67. *See id.* at 883-86; Van Wyck & Shely, *supra* note 18, at 24. This long history includes the following:

In 1933 the Arizona legislature passed a statute making the unauthorized practice of law a misdemeanor. In 1984, the Arizona legislature and the Arizona Supreme Court had a disagreement over the legislature's power to involve itself in State Bar matters. The Supreme Court concluded that the regulation of the practice of law was within its exclusive province. As a result all statutes in Title 32 of the Arizona Revised Statutes relating to the practice of law were sunsetted. Included in the sunseting was the misdemeanor statute on the unauthorized practice of law.

Since 1984 the State Bar and the legislature have tried a number of times to seek some form of consumer protection regulation against unauthorized practice of law. In 1990 the State Bar Board of Governors created a Task Force on [the unauthorized practice of law], which met for two years, holding public hearings on the subject. Ultimately . . . the Task Force recommended . . . that a Non-lawyer Practice Commission be created . . . In 1994, the Board of Governors submitted a petition to the Supreme Court to amend the Court's rules to create the Commission. The Court never issued a formal opinion on the proposal.

In . . . 1993 . . . Senator Marc Spitzer introduced a bill that would have restored criminal sanctions to [the unauthorized practice of law]. The bill died after the Senate Commerce Committee significantly diluted its provisions.

The last legislative attempt to regulate [the unauthorized practice of law] came in 1995, when John Greene, then president of the Arizona Senate, introduced Senate Bill 1055. That bill proposed making [the unauthorized practice of law] a Class 6 felony. [T]he bill died in the House Judiciary Committee.

Id. The committee's goal is to increase public awareness about the unauthorized practice

The committee is also committed to educating bar members and the Arizona legislature on this issue.⁶⁸

C. Ohio and California: Generic Unauthorized Practice of Law Statutes and Rules that the Judiciary Has Expanded

1. Ohio

According to the Ohio Revised Code, only individuals admitted to the Ohio Bar may practice law.⁶⁹ Further, the Supreme Court Rules for the Government of the Bar of Ohio state that “[t]he unauthorized practice of law is the rendering of legal services for another person by any person not admitted to practice in Ohio under Rule I and not granted active status under Rule VI, or certified under Rule II, Rule IX, or Rule XI of the Supreme Court Rules for the Government of the Bar of Ohio.”⁷⁰ In *Land Title Abstract & Trust Co. v. Dworken*,⁷¹ the Supreme Court of Ohio interpreted the state’s laws to set out what is presently considered the definition of the practice of law in Ohio.⁷² The *Dworken* court relied upon an older New York decision, *People v. Alfani*,⁷³ and stated that:

The practice of law is not limited to the conduct of cases in courts. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law.⁷⁴

Since the *Dworken* decision, the Ohio courts and the Ohio Board of Commissioners on the Unauthorized Practice of Law continue to mold

of law through public service programs, the State Bar’s web site, and the dissemination of brochures. *See id.* at 24-25.

68. *See id.* at 25.

69. OHIO REV. CODE ANN. § 4705.01 (Anderson 1999 & Supp. 2000).

70. OHIO GOV. BAR R. VII § 2(A) (2001).

71. 193 N.E. 650 (Ohio 1934).

72. *Id.* at 652. In *Dworken*, the Supreme Court of Ohio issued injunctions against three guarantee title and trust companies for engaging in the unauthorized practice of law. *Id.* at 651; *see also* Mahoning County Bar Ass’n v. Senior Servs. Group, Inc., 642 N.E.2d 102, 105 (Ohio Bd. Unauth. Prac. 1994); Cleveland Bar Ass’n v. Yurich, 642 N.E.2d 79, 84 (Ohio Bd. Unauth. Prac. 1994); Ohio State Bar Ass’n v. Martin, 642 N.E.2d 75, 77 (Ohio Bd. Unauth. Prac. 1994).

73. 125 N.E. 671 (N.Y. 1919).

74. *Dworken*, 193 N.E. at 652.

Ohio's definition of the practice of law through case law.⁷⁵ Today, the practice of law in the context of estate planning in Ohio includes activities such as preparing wills and trust documents, furnishing legal advice to clients, assisting clients in the execution of legal documents, and forming corporations to market and sell trusts.⁷⁶

2. *California*

In California, Section 6125 of the State Bar Act, which the legislature enacted in 1927, states that only active members of the California Bar can practice law in California.⁷⁷ This law, however, fails to define the "practice of law."⁷⁸ California case law interprets this term as "the doing and performing [of] services in a court of justice in any matter depending therein throughout its various stages and in conformity with the adopted rules of procedure."⁷⁹

In *Baron v. City of Los Angeles*,⁸⁰ the California Supreme Court held that this definition does not include all professional activities performed by attorneys.⁸¹ Rather, the State Bar Act, according to the court, was concerned with a smaller range of activities that are defined as the

75. See, e.g., *Green v. Huntington Nat'l. Bank*, 212 N.E.2d 585, 587 (Ohio 1965) (finding that the giving of legal information amounted to giving legal advice as set forth in *Dworken* and constituted, therefore, the unauthorized practice of law); *McMillen v. McCahan*, 167 N.E.2d 541, 550 (Ohio C.P. 1960) (stating that licensed attorneys practicing law typically engage in three main activities: (1) providing clients with legal advice and instructions; (2) preparing documents and papers for clients; and (3) representing clients before public tribunals); *Ohio State Bar Ass'n. v. Martin*, 642 N.E.2d 75, 79 (Ohio Bd. Unauth. Prac. 1994) (holding that the respondent, in preparing trust agreements for a fee and rendering legal services for others, engaged in the unauthorized practice of law; however, in accordance with Florida law, held that the gathering of information did not constitute the practice of law).

76. See *Wills*, *supra* note 46, at 716-17.

77. CAL. BUS. & PROF. CODE § 6125 (Dearing 1993); see also *id.* § 6126 ("Any person advertising or holding himself . . . out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, is guilty of a misdemeanor.").

78. *Id.* § 6125; see Sylvia Stevens, *A Cautionary Note: The Wagons May Be Circling*, 58 OR. ST. B. BULL. 29, 29 (1998) (analyzing *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1 (Cal. 1998), which held that a New York law firm engaged in the unauthorized practice of law when it practiced law in California without a license even though this term is not defined); see also *Birbrower*, 949 P.2d at 13, 14 (Kennard, J., dissenting) (stating that the California legislature failed to define the practice of law).

79. E.g., *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 5 (Cal. 1998) (citing *People v. Merchants Protective Corp.*, 189 Cal. 531, 535 (1922)).

80. 469 P.2d 353 (Cal. 1970) (in banc).

81. *Id.* at 358.

practice of law.⁸² The court acknowledged, however, that deciding which activities constitute the practice of law may be a "formidable endeavor."⁸³ Recently, the California Supreme Court held in *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*⁸⁴ that the practice of law in California requires "sufficient contact with the California client to render the nature of the legal service a clear legal representation."⁸⁵

D. Multidisciplinary Practice of Law: The ABA's Answer to the Unauthorized Practice of Law?

The ABA, like individual states, continues to grapple with the problem of defining the unauthorized practice of law.⁸⁶ Closely linked to this problem is the concept of the multidisciplinary practice of law.⁸⁷ The changing face of the legal profession in general⁸⁸ has prompted the ABA to address the multidisciplinary practice of law.⁸⁹

A multidisciplinary practice (MDP) is a business partnership whereby lawyers and nonlawyer professionals join together to serve clients.⁹⁰ "For example, a lawyer, a social worker, and a certified financial planner

82. See *id.* at 357, 358.

83. *Id.* at 358.

84. 949 P.2d 1 (Cal. 1998).

85. *Id.* at 5. In his dissent, Justice Kennard stated that the majority paid little attention to the actual activities of the New York law firm. See *id.* at 13 (Kennard, J., dissenting). Justice Kennard determined that the New York firm, in an effort to settle a contract dispute in California between its client and a corporation, presented a triable issue of fact regarding whether the activities amounted to the practice of law. See *id.* at 13-14 (Kennard, J., dissenting). Further, Justice Kennard asserted that the majority adopted too broad of a definition of the practice of law. See *id.* at 13 (Kennard, J., dissenting). Justice Kennard supported a narrower definition, as pronounced in the *Baron* case, which more narrowly defined the practice of law "as the representation of another in a judicial proceeding or an activity referring the application of that degree of legal knowledge and technique possessed only by a trained legal mind." *Id.* (Kennard, J., dissenting).

86. See generally Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 1 J. INST. FOR STUDY LEGAL ETHICS 197 (1996) (reviewing the ABA's Commission on Nonlawyer Practice).

87. See Gianluca Morello, Note, *Big Six Accounting Firms Shop Worldwide for Law Firms: Why Multi-discipline Practices Should Be Permitted in the United States*, 21 FORDHAM INT'L L.J. 190, 230 (1997) (explaining how the multidisciplinary practice of law may increase unauthorized practice of law violations).

88. See Ellen E. Deason, *Confronting and Embracing Changes in the Practice of Law*, ILL. B.J., Nov. 1998, at 628, 628 (recalling that the shift from an industrial economy to a global information economy has changed the legal profession); Morello, *supra* note 87, at 190-95 (explaining how large accounting firms have moved into the legal services market).

89. See Robert R. Keatinge, *Multi-Disciplinary Recommendation: An Analysis*, COLO. LAW., Aug. 1999, at 45, 45-46 (examining and analyzing the ABA's study on the multidisciplinary practice of law).

90. See Dianne Molvig, *Multidisciplinary Practices: Service Package of the Future?*, WIS. LAW., Apr. 1999, at 10, 11, 12.

might form an MDP to provide legal and nonlegal services in connection with counseling older clients about *estate planning*, nursing home care and *living wills*.”⁹¹ Australia, Canada, and many European countries already allow for the multidisciplinary practice of law; however, the individual United States prohibit such practice.⁹² Large accounting firms in countries that allow for the multidisciplinary practice of law are at the forefront of this practice; such firms are expanding their services beyond conventional accounting and are offering legal and tax services.⁹³

The issue of the multidisciplinary practice of law is not new to the United States; since 1908 state courts have discouraged this practice, and have outright prohibited it since 1969.⁹⁴ This issue, however, is here to stay, and has been called “the most significant issue facing the bar in the 21st century.”⁹⁵ In August 1998, the ABA appointed a Commission on Multidisciplinary Practice (Commission), which subsequently released recommendations in favor of the multidisciplinary practice of law.⁹⁶

91. ABA Commission on Multidisciplinary Practice, Report, Aug. 1999, at 1, available at <<http://www.abanet.org/cpr/mdpreport.html>> (emphasis added) [hereinafter 1999 ABA Report].

92. See *id.* The District of Columbia allows for the multidisciplinary practice of law with restrictions. See *id.* The D.C. Rules of Professional Conduct limit lawyer-nonlawyer relationships to organizations whose main purpose is to offer legal services. See *id.* at 6. North Dakota considered permitting the multidisciplinary practice of law, but the North Dakota Supreme Court rejected the idea. See Morello, *supra* note 87, at 204.

93. See Morello, *supra* note 87, at 198-203. When measuring size by the number of attorneys employed, PricewaterhouseCoopers and Arthur Anderson are the third and fourth largest law firms in the world respectively. See W. Thomas McGough, Jr., *The ABC's of MDP's*, 10 LAW. J. 4, 4 (1999). KPMG Peat Marwick formed an alliance with a Swedish law firm, named KPMG Wahlin Advokatbyrå, Deloitte & Touche formed an alliance with the Dutch law firm Van Anken Knappe Damstra, and Ernst & Young has several cooperation agreements in the Netherlands, Switzerland, Spain, Germany, France, and Canada. See Morello, *supra* note 87, at 202-03. Arthur Anderson had a subsidiary that practiced law in Europe and Australia, KPMG Peat Marwick has acquired the largest French law firm and also practices law in Australia, and PricewaterhouseCoopers practices law in Europe. See Robert M. Cearley, Jr., *Multidisciplinary Practice*, 34 ARK. LAW. 2, 2 (1999). But see Molvig, *supra* note 90, at 11-12 (stating that skeptics believe large accounting firms, particularly the “Big Five” firms—PricewaterhouseCoopers, Arthur Andersen, KPMG Peat Marwick, Ernst & Young, and Deloitte Touche Tohmatsu—offer legal services and practice law in the United States). The Big Five firms assert they do not furnish legal services and claim that handling business situations that involve legal components does not mean the firms are practicing law. See *id.* at 12. However, it has been said that “[t]he Big Five have been hiring lawyers for years. There’s more tax law practiced in accounting firms than in all the U.S. law firms, and that’s been the case for 20 years.” *Id.*

94. See Rachel Berresford, *Beat 'Em or Join 'Em*, LAW. J., July 30, 1999, at 1, 1.

95. See Molvig, *supra* note 90, at 11 (quoting Sherwin Simmons, the chairman of the ABA Commission on Multidisciplinary Practice).

96. See ABA Commission on Multidisciplinary Practice, Recommendation to the House of Delegates, June 1999, available at <<http://www.abanet.org/cpr/mdp>>

Even if the ABA adopts the recommendations, each state will have to change its own professional conduct rules to allow MDP within its borders.⁹⁷ A review of the existing case law and professional responsibility rules of Florida, Arizona, Ohio, and California reveals the disparity of regulations regarding the unauthorized practice of law among states.⁹⁸ State courts sometimes rely on other state court decisions to formulate their own decisions.⁹⁹ State legislatures, however, must

recommendation.html> [hereinafter *1999 ABA Recommendation*]; ABA Commission on Multidisciplinary Practice, Recommendation to the House of Delegates, July 2000, available at <<http://www.abanet.org/cpr/mdpfinalrep2000.html>> [hereinafter *2000 ABA Recommendation*]. The Commission was appointed in August 1998 by then ABA President Philip S. Anderson to decide whether changes should be made to the ABA Model Rules of Professional Conduct regarding the legal services performed by professional services firms. See *1999 ABA Report*, *supra* note 91. The Commission's July 2000 recommendation states the following:

RESOLVED, that the American Bar Association amend the Model Rules of Professional Conduct consistent with the following principles:

1. Lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services (Multidisciplinary Practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services. "Nonlawyer professionals" means members of recognized professions or other disciplines that are governed by ethical standards.
2. This Recommendation must be implemented in a manner that protects the public and preserves the core values of the legal profession, including competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of interest, and *pro bono publico* obligations.
3. Regulatory authorities should enforce existing rules and adopt such additional enforcement procedures as are needed to implement these principles and to protect the public interest.
4. The prohibition on nonlawyers delivering legal services and the obligations of all lawyers to observe the rules of professional conduct should not be altered.
5. Passive investment in a Multidisciplinary Practice should not be permitted.

2000 ABA Recommendation, supra. The Commission also released a report in July 2000 and concluded that "[a]mending the Model Rules in accordance with the Commission's [2000] Recommendation is the most progressive, preservative, and practical way to accomplish these goals." ABA Commission on Multidisciplinary Practice, Report, July 2000, at 8, available at <<http://www.abanet.org/cpr/mdpfinalrep2000.html>> [hereinafter *2000 ABA Report*]. But cf. Donald S. Gray, *Multidisciplinary Practice of Law*, ORANGE COUNTY LAW., Apr. 1999, at 4, 5 (stating that the ABA views MDP as a serious threat to the traditional practice of American law).

97. See Berresford, *supra* note 94, at 1 (discussing MDPs and stating, in particular, that Pennsylvania will only be affected by the ABA's decision to adopt the recommendation before it if the Pennsylvania Supreme Court modifies the state's professional conduct rules).

98. See Denckla, *supra* note 25, at 2588.

99. See generally *In re Mid-America Living Trust Assocs., Inc.*, 927 S.W.2d 855 (Mo. 1996) (en banc) (citing Colorado, Florida, Iowa, and Ohio cases); *Mahoning County Bar Ass'n v. Senior Servs. Group, Inc.* 642 N.E.2d 102 (Ohio Bd. Unauth. Prac. Law 1994)

adopt a coherent definition of the unauthorized practice of law, in the context of nonlawyer activity, in order to set clear guidelines to combat the inconsistencies that courts face in defining the unauthorized practice of law.¹⁰⁰

II. AN ANALYSIS OF STATE EFFORTS TO CONTROL THE UNAUTHORIZED PRACTICE OF LAW

A. Advisory Opinions

In 1988, the Florida Supreme Court began issuing advisory opinions regarding the unauthorized practice of law in the context of nonlawyer activity.¹⁰¹ The purpose of these opinions includes providing nonlawyers with clear information regarding the unauthorized practice of law.¹⁰² Rather than proposing new conduct, however, the Florida Supreme Court focused on existing legal actions.¹⁰³

In *Florida Bar re Advisory Opinion—Nonlawyer Preparation of Living Trusts*,¹⁰⁴ the Florida Supreme Court found that the “assembly, drafting, execution, and funding of a living trust . . . constitute[s] the practice of law.”¹⁰⁵ The court stated, however, that “gathering the necessary information” for a living trust does not constitute the practice of law.¹⁰⁶ In *Florida Bar v. American Senior Citizens Alliance, Inc.*, the Florida Supreme Court was asked to define the phrase “gathering the necessary information” in connection with living trusts.¹⁰⁷ The court refused the

(citing Colorado, Florida, and Iowa cases).

100. See Nilsson, *supra* note 46, at 30; see also Deason, *supra* note 88, at 630 (noting that one panelist at the 1998 Illinois Allerton House Conference stressed that “if lawyers expect public support and the backing of the legislature for restrictions on the unauthorized practice of law, they must demonstrate incompetent services by nonlawyers that result in significant injuries to the public”); Bruce Hamilton, *What Makes a Great Bar Association*, ARIZ. ATT’Y, Jan. 1995, at 36, 36 (stating that, in 1995, the Arizona Bar Association encouraged the Arizona legislature to “pass an unauthorized practice of law criminal statute to protect the public from nonlawyers practicing law”).

101. See Sondak, *supra* note 48, at 14.

102. See *id.* (identifying one of the goals of the advisory opinions as affording nonlawyers with opportunities to learn whether their conduct amounted to the unauthorized practice of law).

103. See *id.* at 14, 27. “In its advisory opinions, the court has not added any bright lines to the definition of the unlicensed practice of law.” *Id.* at 27.

104. 613 So. 2d 426 (Fla. 1992) (per curiam).

105. *Id.* at 428.

106. *Id.*

107. *Florida Bar v. American Senior Citizens Alliance, Inc.*, 689 So. 2d 255, 258 (Fla. 1997) (stating that the referee recommended that the Florida Supreme Court “issue an opinion . . . clarifying the language in its prior decisions”).

request and instead merely repeated what it asserted in its advisory opinion on the preparation of living trusts.¹⁰⁸

A problem arises when a nonlawyer, in gathering the necessary information, crosses that fine line that the courts have drawn and enters into the unauthorized practice of law.¹⁰⁹ Statutory legislation that provides clear guidelines, rather than case law that is inconsistent with judicial advisory opinions, would be more effective and helpful for nonlawyers, lawyers, and more beneficial to the public.¹¹⁰ In addition, some state courts have relied on the Florida Supreme Court's holding that the "gathering of necessary information" does not constitute the unauthorized practice of law.¹¹¹

Another state, however, has held that gathering necessary information constitutes the unauthorized practice of law when trust associates also give legal advice and predict legal consequences.¹¹² In *In re Mid-America*,¹¹³ the Missouri Supreme Court recognized its responsibility to "determine what constitutes the practice of law, both authorized and unauthorized," and stated that such a determination benefits the public.¹¹⁴ The court further recognized that the unauthorized practice of law is dangerous to the public.¹¹⁵ More notably, Missouri's statutory scheme defines, however, the "practice of law" rather than the unauthorized practice of law.¹¹⁶ The Missouri court's rationale is significant because no state has codified provisions regarding the unauthorized practice of law; hence, courts are more likely to deem an

108. See *id.*; Bromfield, *supra* note 55, at 524.

109. See Bromfield, *supra* note 55, at 524-25; see also *Senior Citizens Alliance*, 689 So. 2d at 257 (explaining that nonlawyer salespeople met and informed customers that the living trusts were *drafted* by an attorney when, in fact, a salesperson *gathered information* regarding a client's assets and received at least half the *drafting* fee from the customer).

110. See Andy Puccinelli, *Reflections on 1998*, NEV. LAW., Jan. 1999, at 5, 5 (noting that the State Bar of Nevada introduced legislation and continues to try to define the parameters of the unauthorized practice of law).

111. See Ohio State Bar Ass'n v. Martin, 642 N.E.2d 75, 79 (Ohio Bd. Unauth. Prac. 1994) (citing the *Nonlawyer Preparation of Living Trusts* advisory opinion and holding that the mere gathering of information was not the practice of law); see also generally Cleveland Bar Ass'n v. Yurich, 642 N.E.2d 79 (Ohio Bd. Unauth. Prac. 1994).

112. See *In re Mid-America Living Trust Assocs., Inc.*, 927 S.W.2d 855, 865 (Mo. 1996) (en banc) (frowning upon the fact that the trust associates did more than gather information).

113. 927 S.W.2d 855 (Mo. 1996) (en banc).

114. *Id.* at 858. ("The duty of this Court is not to protect the Bar from competition but to protect the public from being advised or represented in legal matters by incompetent or unreliable persons.").

115. See *id.* at 859 (attributing this conclusion to the Missouri state legislature).

116. MO. ANN. STAT. § 484.020(1) (1994 & Supp. 2000) ("No person shall engage in the *practice of law* . . . unless he shall have been duly licensed . . .") (emphasis added).

individual case the unauthorized practice of law than to provide an exhaustive definition in cases where the state fails to provide a statutory definition.¹¹⁷

B. Controlling the Unauthorized Practice of Law on a Case-by-Case Basis

States that do not statutorily define the practice of law leave the controversy to the discretion of the judiciary.¹¹⁸ Although the practice of law in Arizona has been defined through case law, there remains no definition of the unauthorized practice of law.¹¹⁹

Problems arise, however, because state courts decide unauthorized practice of law issues on a case-by-case basis without any clear definition to follow.¹²⁰ Further, courts have held legislative efforts that reform the unauthorized practice of law unconstitutional, because courts often view such measures as an infringement on their power to control the bar.¹²¹ For example, in an attempt to define the unauthorized practice of law, the Washington state legislature enacted a statute allowing nonlawyers to engage in specific activities.¹²² The Washington Supreme Court held the statute unconstitutional as an infringement upon separation of powers.¹²³

C. Generic Statutes and Rules that the Courts Must Interpret

Many states have general statutes regulating the practice of law;¹²⁴ however, these statutes often offer the judiciary little guidance when it faces unauthorized practice of law issues.¹²⁵ More specifically, Ohio sets

117. See, e.g., Joyce Palomar, *The War Between Attorneys and Lay Conveyancers—Empirical Evidence Says “Cease Fire!”*, 31 CONN. L. REV. 423, 450 (1999).

118. See *Hunt v. Maricopa County Employees Merit Sys. Comm’n*, 619 P.2d 1036, 1038 (Ariz. 1980) (in banc) (stating that the judiciary controls the practice of law).

119. See *Van Wyck & Shely*, *supra* note 18, at 24.

120. See *id.*

121. See *Talamante*, *supra* note 39, at 877-78.

122. See *id.* at 878 & n. 54 (stating that the Washington statute, WASH. REV. CODE ANN. § 19.62.101, allowed nonlawyers to “draft and complete specified legal documents”); see also WASH. REV. CODE ANN. § 19.62.101 (West 1990) (repealed 1992).

123. See *Talamante*, *supra* note 39, at 878-79 & nn. 55-56.

124. See *supra* note 36 and accompanying text; see also, e.g., CAL. BUS. & PROF. CODE § 6125 (West 1999) (“No person shall practice law in California unless the person is an active member of the State Bar.”); HAW. REV. STAT. ANN. § 605-14 (Michie 1998) (“It shall be unlawful for any person, firm, association, or corporation to engage in or attempt to engage in or to offer to engage in the practice of law, or to do or attempt to do or offer to do any act constituting the practice of law.”).

125. See, e.g., *Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court*, 949 P.2d 1, 17 (Cal. 1998) (Kennard, J., dissenting) (discussing the California legislature’s failure to define the practice of law and the problems with the majority’s holding).

out the unauthorized practice of law through the Rules for the Government of the Bar of Ohio, which state that "[t]he unauthorized practice of law is the rendering of legal services for another person by any person not admitted to practice in Ohio . . . and not granted active status . . . or certified under [certain] Supreme Court Rules"¹²⁶ The Ohio Code states that only individuals registered with the Ohio Bar may practice law in Ohio.¹²⁷ Unauthorized practice of law cases in Ohio, therefore, turn on whether an individual not registered with the Ohio Bar renders legal services.¹²⁸ The Ohio Court of Common Pleas recognized three activities that generally constitute the practice of law: rendering legal advice; preparing documents; and representing clients.¹²⁹ The Ohio Supreme Court later held in *Green v. Huntington National Bank*¹³⁰ that a bank or trust company renders legal advice if it "provides 'specific legal information in relation to the specific facts of a particular person's estate.'"¹³¹ The court did not expand upon its intended meaning of specific legal information; however, the Ohio Board of Commissioners on the Unauthorized Practice of Law relied upon this holding in subsequent cases.¹³²

In *Mahoning County Bar Association v. Senior Services Group, Inc.*,¹³³ a bar association charged a nonlegal corporation with the unauthorized practice of law and claimed that the corporation had furnished legal advice regarding estate planning, probate, and tax matters, including trusts, at seminars.¹³⁴ The corporation admitted to holding seminars, but denied that its activities constituted rendering legal advice.¹³⁵ The board did not mention the specific legal information threshold or the *Huntington* case; rather, the board relied on other cases, including some

126. OHIO GOV. BAR R. VII § 2(A) (2001).

127. OHIO REV. CODE ANN. § 4705.01 (Anderson 1999 & Supp. 2000).

128. See, e.g., *Stark County Bar Ass'n v. Beaman*, 574 N.E.2d 599, 600 (Ohio Bd. Unauth. Prac. 1990) ("[T]he issue before this board is whether respondents' activities constitute the 'rendering of legal services' and, therefore, the unauthorized practice of law.").

129. See *McMillen v. McCahan*, 167 N.E.2d 541, 550 (Ohio C.P. 1960).

130. 212 N.E.2d 585 (Ohio 1965).

131. *Id.* at 587.

132. See, e.g., *Ohio State Bar Ass'n v. Martin*, 642 N.E.2d 75, 78 (Ohio Bd. Unauth. Prac. 1994); *Cleveland Bar Ass'n v. Yurich*, 642 N.E.2d 79, 85 (Ohio Bd. Unauth. Prac. 1994).

133. 642 N.E.2d 102 (Ohio Bd. Unauth. Prac. 1994).

134. *Id.* at 102.

135. See *id.* at 103. Rendering legal advice is one of the three activities that generally constitutes the practice of law. See *McMillen v. McCahan*, 167 N.E.2d 541, 550 (Ohio C.P. 1960).

from out-of-state.¹³⁶ Ohio case law reveals inconsistencies in relying on judicial interpretations of the unauthorized practice of law.¹³⁷

III. THE DIFFICULTIES BEHIND PASSING UNAUTHORIZED PRACTICE OF LAW STATUTES

A statute is “[a]n act of the legislature declaring, commanding, or prohibiting something . . . the written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state.”¹³⁸ State statutes commonly refer to the practice of law and the unauthorized practice of law in the context of what attorneys can and cannot do, rather than in the context of nonlawyers practicing law.¹³⁹ Nonlawyers who market, sell, and draft living trusts are not bound by the same rules that bind attorneys.¹⁴⁰ Without statutes, courts are left with little guidance in handling unauthorized practice of law matters.¹⁴¹

A. *The Public Does Not Fully Support Unauthorized Practice of Law Measures*

There are different reasons that explain why legislatures do not pass statutes that clearly define the unauthorized practice of law.¹⁴² Attorneys’ fees can run quite high, and individuals of lesser means may

136. See, e.g., *Senior Servs. Group, Inc.*, 642 N.E.2d at 103-05 (citing to *Yurich*, 642 N.E.2d at 79; *Martin*, 642 N.E.2d at 75; Florida Bar re Advisory Opinion—Nonlawyer Preparation of Living Trusts, 613 So. 2d 426 (Fla. 1992) (per curiam); *People v. Volk*, 805 P.2d 1116 (Colo. 1991).

137. See *supra* notes 128-36 and accompanying text (discussing such inconsistencies in Ohio case law).

138. BLACK’S LAW DICTIONARY 1410 (6th ed. 1990).

139. See, e.g., ALA. CODE § 34-3-6 (1997) (stating that “persons as are regularly licensed have authority to practice law” which includes, but is not limited to, “advis[ing] or counsel[ing] another as to secular law, or draw[ing] or procur[ing] or assist[ing] in the drawing of a paper, document or instrument affecting or relating to secular rights”); MD. CODE ANN., BUS. OCC. & PROF. § 10-101(h)(1)(i)-(iii) (1989) (“‘Practice law’ means to engage in any of the following activities: (i) giving legal advice; (ii) representing another person . . . ; or (iii) performing any other service that the Court of Appeals defines as practicing law.”).

140. See Cornelia Wallis Honchar, *Evolving Standards of Nonlawyer Liability*, 6 PROF. LAW. 14, 14 (1995) (stating that nonlawyers’ activities go unregulated).

141. See generally Nilsson, *supra* note 46, at 29-30.

142. See Calle, *supra* note 38, at 15 (explaining that statutes fail to pass because attorneys lack support in the state legislatures); see also Deason, *supra* note 88, at 630 (arguing that attorneys must expose the injuries caused to the public by nonlawyers in order to get support from the legislature); Hendricks, *supra* note 29, at 35 (arguing that attorneys must remain outspoken in the legislatures in order to protect attorneys and clients from the consequences of the unauthorized practice of law).

not be able to afford such costs.¹⁴³ It will be difficult to convince the public that such laws are necessary if the public believes that nonlawyers offer less expensive alternatives.¹⁴⁴

Further, the legal profession has its critics,¹⁴⁵ and many individuals fear lawyers.¹⁴⁶ Anti-lawyer sentiment exists in our society and negative images are often associated with attorneys.¹⁴⁷ It is also argued that the public may actually perceive unlicensed individuals who offer legal services as lawyers, or at least as legitimate actors in the legal profession.¹⁴⁸ When an unlicensed individual victimizes a consumer, attorneys often are blamed despite their lack of fault or involvement.¹⁴⁹

B. Nonlawyers Assert Attorney Domination

Oftentimes, when discussing the unauthorized practice of law, nonlawyers claim that such prohibitions create a monopoly for attorneys.¹⁵⁰ Arguments opposing this monopoly often posit that nonlawyer legal assistance "subject[s] clients to . . . greater risks of incompetence, conflict of interest, and dishonesty that their exclusion

143. See Denckla, *supra* note 25, at 2599; see also Rhode, *supra* note 86, at 209 (stating that the legal needs of nearly three quarters of low-income individuals and about 60% of middle-income individuals are not met). But see Sherri Kimmel, *Stemming the Tide of Unauthorized Practice*, ME. B.J., July 1998, at 164, 165 (noting that no shortage of attorneys who perform legal services at fair rates exists).

144. See Deason, *supra* note 88, at 630 (suggesting that attorneys should offer greater services to counter the perception that nonlawyers offer better services at a lower cost than lawyers); see also Calle, *supra* note 38, at 12 (quoting Yuma, Arizona attorney Richard D. Engler as saying that "[i]f there's anyone who feels that untangling a 20-year marriage can be done for \$250, then I don't want their business If their opinion of legal services is that low, I don't want the business"); see also Kimmel, *supra* note 143, at 164 (citing William F. Hoffmeyer, a major advocate of rules regulating the unauthorized practice of law, as stating that it costs clients much more to reverse the harm done by nonlawyers than to hire a lawyer in the first place); Shurtz, *supra* note 11, at 294. "[T]he bitterness of paying for an improperly designed estate plan will remain long after the sweetness of low price is forgotten." *Id.* (quoting estate planning author Doug H. Moy).

145. See, e.g., Denckla, *supra* note 25, at 2594, 2599.

146. See John Gibeaut, *Share the Wealth*, 85 A.B.A. J. 14, 16 (1999) ("[L]awyers are scary to the average person."). A solo practitioner may have said it best: "[P]eople are afraid of lawyers." *Id.*

147. See Hendricks, *supra* note 29, at 32, 35 (conceding that attorneys themselves should bear some of the responsibility for their public image because they describe each other in negative ways).

148. See *id.* at 32.

149. See *id.* (lamenting that attorneys get the "worst of both worlds").

150. See Palomar, *supra* note 117, at 428-29; see also Quintin Johnstone, *Bar Associations: Policies and Performances*, 15 YALE L. & POL'Y REV. 193, 218-19 (stating that common arguments against a monopoly by attorneys include higher legal fees and less assistance for lower-income individuals).

from practicing law [is] justified.”¹⁵¹ Other issues involve whether licensing requirements would diminish the risks posed by nonlawyers practicing law and whether legal fees would be reduced for the public.¹⁵²

Nonlawyers who argue against unauthorized practice of law prohibitions rely on cases involving individuals who were injured by incapable and corrupt attorneys.¹⁵³ Nonlawyers also assert that their specialization and knowledge in legal fields are more extensive than those of many attorneys.¹⁵⁴ In the area of real estate, for example, individuals advocating the abolition of the unauthorized practice of law prohibitions assume that nonlawyers’ specializations make them as capable as attorneys and that consumers should have the opportunity to weigh the differences.¹⁵⁵ In order to aid the passage of unauthorized practice of law statutes, state bar associations should take more responsibility to define clearly the unauthorized practice of law.¹⁵⁶

C. State Bar Associations Must Overcome Limitations in Order To Take Action

Each state has its own bar association that “aim[s] to benefit the legal professional generally by helping to maintain a competent, respected, and ethically responsible body of lawyers and by protecting the profession from unqualified legal service competition.”¹⁵⁷ State bar associations also strive to benefit the public by increasing public knowledge of and respect for law and legal institutions, and by promoting changes in the law they regard as necessary.¹⁵⁸ State bar

151. Johnstone, *supra* note 150, at 219.

152. *See id.*

153. *See* Palomar, *supra* note 117, at 429 & n.8.

154. *See infra* note 185 (discussing nonlawyers’ assertions of expertise).

155. *See* Palomar, *supra* note 117, at 431 (“[M]ore unauthorized practice proceedings have been brought to restrain laypersons from providing real estate settlement services than any other single type of service.”).

156. *See* Van Wyck & Shely, *supra* note 18, at 24; *see also* Deason, *supra* note 88, at 630 (emphasizing that the bar must define attorneys’ activities and warrant why particular activities constitute the unauthorized practice of law); Puccinelli, *supra* note 110, at 5 (1998) (stating that, in 1996, the State Bar of Nevada encouraged the legislature to pass unauthorized practice of law legislation; however, criticisms prompted withdrawal of the legislation).

157. Johnstone, *supra* note 150, at 195. Although bar associations hold an important position in the American legal system, they receive little scholarly attention. *See id.* at 193. In addition to state bar associations, local bar associations, such as the Los Angeles County Bar Association, the Chicago Bar Association, and the Association of the Bar of the City of New York also exist. *See id.* at 196-97.

158. *See id.* at 195-96. The State Bar of California’s Estate Planning, Trust and Probate Law Section created a “truth squad” to educate the public about the advantages and disadvantages of living trusts and other estate planning documents. Stiegel et al.,

associations, however, face many obstacles and limitations to their effectiveness¹⁵⁹ and need more comprehensive data on the problems and issues that attorneys face and the organizations with which attorneys interact.¹⁶⁰ Many bar association projects are inadequately integrated and overly redundant of one another.¹⁶¹ As a result, these associations largely lack efficiency and effectiveness.¹⁶²

Bar associations do attempt to curtail the unauthorized practice of law through the employment of unauthorized practice committees.¹⁶³ For example, the State Bar of California created a "truth squad" to combat the unauthorized practice of law regarding living trusts,¹⁶⁴ the Illinois State Bar Association developed a "living trust task force,"¹⁶⁵ and the State Bar of Michigan implemented a "Standing Committee on the Unauthorized Practice of Law."¹⁶⁶ Those entities and individuals who oppose bar associations' attempts to regulate the unauthorized practice of law, however, may respond to such attempts by launching harmful media campaigns.¹⁶⁷ For example, in 1993, the Arizona Bar Association

supra note 17, at 21.

159. See Johnstone, *supra* note 150, at 230-34. Limitations such as monetary funding, reliance on member volunteers, membership diversity, geographic distribution of members, and disparities between the goals of furthering members' interests and furthering the public's interests impede the productivity of bar associations. See *id.* Bar associations generate income mostly through members' dues and, in some instances, member resistance has resulted in associations reducing their dues. See *id.* at 197-98. This financial limitation also hampers the success of these associations. See *id.*

160. See *id.* at 202. Bar associations also need to increase interaction with each other regarding issues of common concern. See *id.* at 203.

161. See *id.* (attributing bar associations' weak influence on lawyer-education programs and law reform to ineffective bar activities).

162. See *id.*

163. See *id.* at 219-20. Committees are subgroups of associations, and members are appointed by individuals in leadership positions. See *id.* at 201. These committees service the general bar membership and outside groups, maintain relations with other organizations, and advocate law reform in different areas. See *id.* These committees even render opinions on whether particular conduct constitutes unauthorized practice of law. See *id.* at 220 n.146.

164. Stiegel et al., *supra* note 17, at 21.

165. *Id.*

166. Thomas K. Byerley, *Permanent Injunctions—Unauthorized Practice of Law*, MICH. B.J., May 1999, at 458, 458 (explaining that the Standing Committee monitors the unauthorized practice of law and then makes recommendations to the State Bar as to whether permanent injunctions against violators should be filed). The Standing Committee filed a permanent injunction against a Michigan nonlawyer who sold and prepared living trusts for \$3,000 each. See *id.* The Standing Committee also filed an injunction against a corporation and its nonlawyer agents for furnishing estate documents, including *trust documents*. See *id.* at 459. The court legally enjoined the corporation from preparing such documents. See *id.*

167. See Johnstone, *supra* note 150, at 220. One solution to this problem suggests that

backed an unauthorized practice of law bill that ultimately failed in the legislature.¹⁶⁸ The bill's proponents regarded their efforts as a public protection measure.¹⁶⁹ Arizona paralegals, on the other hand, opposed the bill and labeled it "a full-employment bill for lawyers," and opponents in the Arizona legislature viewed the bill as "feather bedding" for lawyers.¹⁷⁰

Similarly, in 1996, the State Bar of Nevada backed unauthorized practice of law legislation that was ultimately withdrawn due to criticism from opponents.¹⁷¹ Determined to combat the unauthorized practice of law, the State Bar of Nevada drafted subsequent legislation and pre-filed it with the Legislative Council Bureau.¹⁷² In 1998, the Nevada Bar hired a full-time investigator to examine accusations regarding the unauthorized practice of law, a move that proved successful for attorneys.¹⁷³

The Pennsylvania Bar Association, through its unauthorized practice of law committee, provides the public, lawyers, judiciary, and legislators with information regarding the unauthorized practice of law.¹⁷⁴ Also, the committee writes opinions continuously on unauthorized practice of law violations occurring within Pennsylvania, which are forwarded to resident judges, legal newspapers, and public forums.¹⁷⁵ This publicity makes the issues surrounding unauthorized practice of law more visible within Pennsylvania, as well as outside of the state.¹⁷⁶ The committee supported a bill that ultimately passed in 1996, which imposed stricter penalties for the unauthorized practice of law.¹⁷⁷

attorneys should inform the public of the specialized services that attorneys provide. *See* Deason, *supra* note 88, at 629.

168. *See* Calle, *supra* note 38, at 14. The bill would have made engaging in the unauthorized practice of law a class 5 felony. *See id.*

169. *See id.*

170. *Id.*

171. *See* Puccinelli, *supra* note 110, at 5.

172. *See id.* (describing the Nevada Bar's determination to deter the unauthorized practice of law).

173. *See id.* (explaining that, in 1998, the Bar successfully enjoined an immigration service from furnishing illegal services to immigrants). The State Bar of Nevada also created a web site to facilitate communication on this issue. *See id.*

174. *See* Kimmel, *supra* note 143, at 165.

175. *See id.*

176. *See id.* (commending Pennsylvania and saying that Pennsylvania is truly in the "forefront of opposing unauthorized practice of law").

177. *See id.* Another example of the Committee's success includes a win by a local bar association in a case against property tax consultants. *See id.*

IV. WHY THE PUBLIC NEEDS PROTECTION

Although the definition of the practice of law varies from jurisdiction to jurisdiction,¹⁷⁸ restricting such practice to licensed members of a state's bar serves to protect the public from harm by unlicensed individuals.¹⁷⁹ Nonlawyers who draft living trusts have the ability to injure the public with such practices.¹⁸⁰ "The public needs to understand why it is to their [sic] advantage to consult attorneys and how the prohibitions on the unauthorized practice of law are designed for their [sic] protection."¹⁸¹ The public must be made aware of the fact that lawyers are qualified to offer special services,¹⁸² particularly in the area of drafting living trusts.¹⁸³

178. See Denckla, *supra* note 25, at 2581 (going as far to say that the definition may even vary within one particular jurisdiction).

179. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.5 cmt. 1 (2000). Comment 1 states that "[t]he definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons." *Id.*

180. See, e.g., Stiegel et al., *supra* note 17, at 20 (recounting that an 83-year-old man purchased a living trust from an insurance agent who, after gathering the man's financial information, pressured him to then purchase an annuity); *SEC Halts Fraudulent Investment Scheme Targeting Senior Citizens*, SEC NEWS DIG., Sept. 2, 1999, at 5-7, available in 1999 WL 6696513 (reporting that a U.S. district court granted a temporary restraining order against four Texas business services for scamming approximately \$2.5 million from elderly people since 1992 by claiming these businesses could provide living trusts) [hereinafter *Fraudulent Investment Scheme*]; *Insurance Agent Accused of Defrauding Elderly Clients*, ASSOCIATED PRESS, Aug. 13, 1999, available in Westlaw, News Library, APWIRE File (reporting that an insurance agent was accused of swindling \$3.1 million from elderly clients by setting up living trusts for them and influencing them to invest in high-interest promissory notes); *State Attorney General's Office Sues Company That Sells Living Trusts*, ASSOCIATED PRESS, July 23, 1999, available in Westlaw, News Library, APWIRE File (stating that the South Carolina attorney general's office sought a temporary restraining order for a firm that made, among other things, misleading statements about living trusts).

181. Deason, *supra* note 88, at 630 (arguing that the unauthorized practice of law will continue to grow "unless the public is convinced that lawyers offer greater competence and service").

182. See *id.* at 629; see also Calle, *supra* note 38, at 10 (asserting that the State Bar of Arizona has claimed that hundreds of Arizona citizens are "harmed by unskilled document preparers").

183. See Committee on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Baker, 492 N.W.2d 695, 703 (Iowa 1992) (concluding that an attorney's professional judgment is necessary to determine if a living trust is appropriate); Barlow F. Christensen, *The Unauthorized Practice of Law: Do Good Fences Really Make Good Neighbors-Or Even Good Sense?*, 1980 AM. B. FOUND. RES. J. 159, 206 (1980). The author recognized that:

Proficiency in the field of estate planning requires knowledge of difficult and technical fields of law—estates, trusts, wills, and tax law—that may not be at the command of the average insurance agent [M]ost insurance agents have not had extensive further training, and as a general matter the competency of insurance agents in the drafting of estate plans would seem to be questionable at

Nonlawyers are not usually skilled in this area and the public must be aware of this as well¹⁸⁴ because nonlawyers often advertise themselves as being highly qualified in the area of living trusts and perhaps even better qualified than attorneys.¹⁸⁵

Attorneys have the necessary experience and expertise to make educated decisions as to whether a revocable living trust would be suitable for an individual.¹⁸⁶ Although living trusts are experiencing a surge in popularity,¹⁸⁷ they are not the best estate planning tool for everyone.¹⁸⁸ Unfortunately, in an effort to further their own objectives,¹⁸⁹

best.

Id. (emphasis added).

184. See Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, Or, We Don't Have To Think of England Anymore*, 62 ALB. L. REV. 543, 565 (1998) (conceding that nonlawyers "generally do a dreadful job of drafting trust instruments").

185. See Denmark Information Service, *Will Kits, Incorporating in Nevada, Legal Forms, Durable Power of Attorney Kits, Living Trusts, Estate Planning, Instructional Videos and More* (visited Sept. 18, 2000) <<http://www.denmarkinfo.com>> (arguing that for simple legal matters, it is better to forego an attorney in order to save money); Heritage Living Trust, *The Definitive Living Trust Website* (visited Sept. 18, 2000) <<http://www.heritagelivingtrust.com/About/page1.htm>> ("We prepare hundreds of [l]iving [t]rusts every year and understand every nuance involved in their creation. Unlike 95% of attorneys who have limited experience with these legal entities, Heritage Trust does nothing else, and is your most knowledgeable and qualified source for a Living Trust."); Independence Trust, *A Full-Service Trust Company Serving America Since 1977* (visited Sept. 18, 2000) <http://www.my-trust.com/page2_new.htm> (stating that law schools do not teach much about the trust business and, therefore, most attorneys have little experience in this field of law).

186. See Florida Bar re Advisory Opinion—Nonlawyer Preparation of Living Trusts, 613 So. 2d 426, 427 (agreeing that an attorney must determine if a client needs a living trust); Bruce G. Cohn & Martha S. Stonebrook, *The Living Trust in Utah—Boon or Boondoggle*, 6 UTAH B.J. 10, 12 (1993) (concluding that an attorney and client can decide together which estate planning tools are necessary to reach the client's goals and objectives); see also Bromfield, *supra* note 55, at 523 ("The preparation of a living trust involves complex legal matters which the typical nonlawyer salesperson will not understand."); Mattina, *supra* note 13, at 409 ("Attorneys in our community have for many years drafted *revocable Living Trusts for clients for whom such instruments are appropriate.*") (emphasis added).

187. See *supra* note 6 and accompanying text (discussing how prevalent living trusts have become and illustrating the various types of trusts available).

188. See Mattina, *supra* note 13, at 412 ("What we find most dismaying in our community is the promotion of living trusts as suitable, indeed necessary, for everyone."); see also Cohn & Stonebrook, *supra* note 186, at 10-11 (concluding that nonlawyers who market living trusts usually highlight the positive aspects and fail to discuss the negative aspects).

189. See Modisett, *supra* note 6, at 19 (explaining how nonlawyers lure individuals in through marketing living trusts and then try to sell other instruments such as insurance policies and annuities); see, e.g., *Fraudulent Investment Scheme*, *supra* note 180, at 5-6 (reporting that four individuals running estate planning services collected some \$2.5

nonlawyers sometimes promote revocable living trusts when simple wills are sufficient.¹⁹⁰ Selling an unnecessary living trust to an individual may be a deceptive act that may needlessly complicate an individual's estate.¹⁹¹

Living trusts are often promoted as a perfect probate avoidance tool;¹⁹² however, for most individuals the cost of the trust exceeds the informal probate fees of a will.¹⁹³ Not only are living trusts expensive to create, they are also costly to maintain.¹⁹⁴ "Improvident use of the living trust may create a financial boondoggle for the client."¹⁹⁵ Oftentimes, an unnecessary living trust may cause damage that does not surface for many years.¹⁹⁶

More specifically, nonlawyer salespersons often tell individuals that living trusts also provide for a private transfer of wealth.¹⁹⁷ Although living trust documents are not usually filed as public documents with courts, privacy is not guaranteed.¹⁹⁸ Any ensuing litigation resulting from the trust becomes part of the permanent public court records.¹⁹⁹ Furthermore, many individuals, in addition to the grantor, have access to the trust document throughout the life of the trust.²⁰⁰ Nonlawyer

million from individuals by purporting to provide living trusts and other estate planning instruments).

190. See generally Cohn & Stonebrook, *supra* note 186, at 10, 11 (discussing the harm individuals face when trusts are drafted instead of wills and dispelling common myths associated with living trusts). But see Gerald P. Johnston, *Legal Malpractice in Estate Planning and General Practice*, 17 MEMPHIS ST. U. L. REV. 521, 522 (1987) (charging that estate planning malpractice does occur due to attorney negligence).

191. See Modisett, *supra* note 6, at 19-20 (detailing Indiana's Deceptive Consumer Sales Act). Critics frequently complain that salespersons deceptively promote living trusts as an effective estate planning device for everyone. See *id.* at 20.

192. See Andrew Grene, *ISBA Defers Action on Arbitration*, CHI. DAILY L. BULL., Mar. 29, 1993, at 3 (quoting Peter Lousberg, the then Illinois State Bar Association President, as saying that persuading individuals to buy living trusts by using threats of probate "was a shibboleth that fits in well with lawyer-bashing"); see also *The Nonprobate Revolution*, *supra* note 9, at 1116 (admitting that the public is disgruntled with the probate system).

193. See Cohn & Stonebrook, *supra* note 186, at 10 (stating that probate is not the "costly nightmare" it is made out to be).

194. See *id.* at 12.

195. *Id.*

196. See Stiegel et al., *supra* note 17, at 20 (describing many living trusts as "time bombs").

197. See Cohn & Stonebrook, *supra* note 186, at 11 (characterizing the privacy commonly connected with living trusts as illusory).

198. See *id.*

199. See *id.*

200. See *id.* (explaining that other individuals may view the trust contents when the trust is opened, when trust investments are being made, and when other assets are

salespeople often discourage the use of wills by pointing out that such documents are publicly filed with courts.²⁰¹ In fact, wills are rarely contested, so only a small number of people actually read filed wills.²⁰² In general, nonlawyers market the positive traits of living trusts and do not divulge the downsides.²⁰³

Attorneys, however, incur ethical obligations to clients²⁰⁴ and to the legal profession,²⁰⁵ which are generally overseen by the ABA and state bar associations.²⁰⁶ Nonlawyers are not subject to bar association rules or professional responsibility obligations.²⁰⁷ Therefore, nonlawyers do not have formal professional obligations to the public and can disregard ethical considerations with little or no accountability.²⁰⁸ This lack of oversight places the public at a greater risk.²⁰⁹ The public's confidentiality with and its options for redress against nonlawyers may be jeopardized.²¹⁰ Case law reveals that courts are also aware of the need for protection of the public from nonlawyers who market, sell, and draft living trusts.²¹¹ Although states have made inroads to public protection, many individuals remain unprotected.

transferred to the trust).

201. *See id.*

202. *See id.* (noting that wills remain private during the testator's lifetime and implying that this serves the testator's need for privacy). Obviously, once the testator has died, any right to privacy evaporates. *See id.*

203. *See id.* at 10-11.

204. *See id.* at 11; *see also* Bromfield, *supra* note 55, at 523-24 (noting that nonlawyer salespeople do not owe clients the same ethical and fiduciary duties that an attorney does).

205. *See generally* Hendricks, *supra* note 29 (focusing on the harm that the unauthorized practice of law invokes on the public and the legal profession).

206. *See* MODEL RULES OF PROFESSIONAL CONDUCT at vii (2000).

207. *See* Honchar, *supra* note 140, at 14; Bromfield, *supra* note 55, at 536-38 (stating that nonlawyers are "not subject to discipline by a state bar or any other regulatory body").

208. *See* Hendricks, *supra* note 29, at 33 (arguing that a nonlawyer, in a tort law context, has no reason to care about a client's long term consequences). All fields of law that are affected by unauthorized practice issues, including tax law and probate law, are equally crippled by the harms caused to the public and the profession. *See id.* at 34.

209. *See* Honchar, *supra* note 140, at 14-16 (explaining that an individual who hires a nonlawyer may have no redress should something go wrong).

210. *See id.* Nonlawyer liability is nowhere near as universal as legal malpractice and disciplinary liability are for attorneys. *See id.* at 14. The scope of a nonlawyer's duties and responsibilities to clients remains uncertain. *See id.* at 17; *see also* Modisett, *supra* note 6, at 23 (arguing that the public needs to be aware of the fact that drawing legal living trust documents requires an understanding of tax, probate, family, and elder law areas in which lawyers are educated and experienced).

211. *See, e.g.,* Florida Bar v. American Senior Citizens Alliance, Inc., 689 So. 2d 255, 257 (Fla. 1997) (discussing how clients were neglected and the public was harmed).

V. THE ABA'S ATTEMPTS TO TAKE ACTION: SUPPORTING THE MULTIDISCIPLINARY PRACTICE OF LAW

The ABA Commission on Multidisciplinary Practice defines MDP as:

[A] partnership, professional corporation, or other association or entity that includes lawyers and nonlawyers and has as one, but not all, of its purposes the delivery of legal services to a client(s) other than the MDP itself or that holds itself out to the public as providing nonlegal, as well as legal, services. It includes an arrangement by which a law firm joins with one or more other professional firms to provide services, including legal services, and there is a direct or indirect sharing of profits as part of the arrangement.²¹²

Although the Commission recommends that the ABA amend its Model Rules of Professional Conduct to permit lawyers to share legal fees with nonlawyers,²¹³ the Commission has expressed that nonlawyers should not be permitted to deliver legal services.²¹⁴

In practice, a MDP is a partnership owned jointly by lawyers and nonlawyers from various fields who work together to serve their clients' needs.²¹⁵ Of course, the MDP concept has its proponents and opponents.²¹⁶ The 1999 ABA Recommendation suggested that attorneys

212. 1999 ABA Recommendation, *supra* note 96, at 1. The Commission, in its study of MDP, heard 60 hours of testimony from 56 witnesses and reviewed numerous written and oral statements, provided by U.S. and foreign attorneys, consumer advocates, accounting firm representatives, law professors, ABA chairpersons, bar association officers and ethics counsels, small business clients, the American Corporate Counsel Association, and counsel of international corporations. See 1999 ABA Report, *supra* note 91, at 1.

213. See 2000 ABA Recommendation, *supra* note 96, at 1. Such sharing of legal fees are subject to safeguards in order to preserve the core values of the legal profession. See *id.* Rule 5.4 of the Model Rules of Professional Conduct currently bars an attorney from sharing fees (except in connection with a compensation or retirement plan) with nonlawyers and from providing legal services in a firm owned by nonlawyers. MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.4(a), (c) (2000). Examples of these core values include professional independence of judgment, protection of confidential client information, and client loyalty. See 1999 ABA Report, *supra* note 91, at 2.

214. See 1999 ABA Report, *supra* note 91, at 2. The 2000 ABA Report stresses that lawyers involved in MDPs assert "control and authority" to assure lawyer independence, which can be accomplished in different ways depending on the MDP. 2000 ABA Report, *supra* note 96, at 2. "Control and authority" factors may include percentage of ownership in the MDP or the MDP's primary purpose, but would essentially be based on substance, not form. *Id.*

215. See 1999 ABA Recommendation, *supra* note 96, at 1; see also Molvig, *supra* note 90, at 12.

216. See Gray, *supra* note 96, at 5. Arguments in favor of MDPs include: "increased efficiency, one-stop-shopping, inevitable business evolution, survival of the fittest, global trend, and consumer driven initiatives." *Id.* Proponents also claim that MDPs provide new opportunities in corporate business. See Berresford, *supra* note 94, at 1. MDPs

in a MDP would practice law by offering services that attorneys in a regular law firm would offer.²¹⁷ This “overbroad definition,” however, could result in unauthorized practice of law claims against nonlawyers who offer these services.²¹⁸ Individuals in certain business fields, such as accounting and tax preparation, historically have furnished clients with “law-related services.”²¹⁹ If such businesses merge with law firms to form MDPs, then nonlawyers, such as accountants, tax preparers, and estate planners, may be in jeopardy of unauthorized practice of law charges.²²⁰ MDPs also may place attorneys in jeopardy of violating unauthorized practice of law rules when lawyers work with nonlawyers, and consequently assist in the violations committed by nonlawyers.²²¹ To illustrate, a MDP client may ask a nonlawyer for advice that, unbeknownst to either, actually constitutes legal advice.²²² The nonlawyer is unable legally to furnish the advice, and the lawyer is unable legally to assist the nonlawyer.²²³

It is very likely that MDPs would provide a host of services that may constitute the practice of law.²²⁴ “If the bar and courts do not take action to address the issues, the conduct of MDPs will be without any regulation

allegedly will offer greater benefits to clients, in the form of efficient client representation, reduced legal costs, and enhanced firm-client communication. See Morello, *supra* note 87, at 239. MDP proponents believe that if attorneys cannot join MDPs “they risk becoming dinosaurs.” Molvig, *supra* note 90, at 13. Sherwin Simmons, the Chairman of the ABA Commission on Multidisciplinary Practice, regards the multidisciplinary practice as the most important legal issue of the 21st century. See *id.* at 11.

Opponents, on the other hand, argue that if lawyers engage with nonlawyers in MDPs, core values such as client loyalty and confidentiality will be sacrificed. See *id.* at 13. Opponents also argue that MDPs would benefit the most profitable practice areas but result in a shortage of legal services in the less profitable practice areas. See Morello, *supra* note 87, at 239. Arguments against MDPs also include violating the ABA Model Rules, violating state laws that prohibit fee splitting, breaching the attorney-client privilege, encroaching on attorneys’ independent judgment, and placing the profit motive above clients’ needs. See Gray, *supra* note 96, at 5. Opponents believe that MDPs will result in many problems related to the unauthorized practice of law and conflicts of interest. See Berresford, *supra* note 94, at 1.

217. See 1999 ABA Recommendation, *supra* note 96, at 2 (“A lawyer in an MDP should not represent to the public generally or to a specific client that services the lawyer provides are not legal services if those same services would constitute the practice of law if provided by a lawyer in a law firm.”).

218. John S. Dziekowski & Robert J. Peroni, *ABA’s Definition of Practice Flawed*, NAT’L L.J., July 26, 1999, at A27.

219. See *id.*

220. See *id.*

221. See Morello, *supra* note 87, at 230.

222. See *id.*

223. See *id.* (noting the constraints imposed by the Model Rules of Professional Conduct).

224. See Keatinge, *supra* note 89, at 46.

whatsoever, unless the courts choose to exercise their jurisdiction to restrict the unauthorized practice of law.²²⁵ However, even if states do decide to allow for the multidisciplinary practice of law, there exists concern that nonlawyers may engage in the practice of law at higher rates.²²⁶ States would be remiss not to have clear and comprehensive unauthorized practice of law statutes.²²⁷ In order for courts to regulate properly the unauthorized practice of law, clear statutes must first be in place.²²⁸

VI. CONCLUSION

The current state of the unauthorized practice of law is far from uniform. In order to protect the public, the unauthorized practice of law must be regulated tightly. States employ different methods to define and regulate the unauthorized practice of law. However, due to vague statutory definitions of the practice of law, courts are often left with little guidance to rule upon unauthorized practice of law cases. Further, nonlawyers and lawyers alike may very well be unaware of whether their actions actually constitute the unauthorized practice of law, particularly in the growing business of living trusts, where much of the work is conducted outside of the courtroom.

State bar associations must define clearly the unauthorized practice of law in order to guide state legislatures toward passing effective unauthorized practice of law statutes. These statutes must be in place before states can embrace the multidisciplinary practice of law—a very important issue facing the legal profession that the ABA has already embraced.

225. *See id.* Given that clients may prefer MDPs, it remains uncertain whether courts would actually restrain MDPs under unauthorized practice of law statutes. *See id.*

226. *See, e.g.,* Berresford, *supra* note 94, at 1 (stating that MDPs will open a “Pandora’s box” of problems related to the unauthorized practice of law).

227. *See* Deason, *supra* note 88, at 630.

228. *See supra* sections III & IV (discussing why courts need clear statutes in order to decide unauthorized practice of law matters, as well as the barriers associated with passing such statutes). The Commission expressed in the 2000 ABA Report to postpone action relating to MDP issues until the ABA’s 2001 mid-year meeting because many state and local bars have not completed their MDP reviews. 2000 ABA Report, *supra* note 96, at 2.